Nos. 34, 47, 48 & 49.

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JAMES H. McKENNEY

# In the Supreme Court of the United States

OCTOBER TERM, 1900.

Sup. Ct. of Utah v. Hewitt
Dep't. Error in 34 & P.C. &
other ca

No. 34.

FRED HEWITT,
*Plaintiff in Error,*

vs.

EMIL SCHULTZ, et al.

Filed Oct. 11, 1900.

No. 47.

WILLIAM L. POWERS, et al.,
*Plaintiffs in Error,*

vs.

JACOB SLAGHT.

No. 48.

J. M. MOORE,
*Plaintiff in Error,*

vs.

D. B. STONE, et al.

No. 49.

J. M. MOORE,
*Plaintiff in Error,*

vs.

JOHN CARMODE,

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR IN NO. 34 AND PLAINTIFFS IN ERROR IN NOS. 47, 48 AND 49.

C. W. BUNN and
JAMES B. KERR,
Of Counsel.

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We purpose in this additional brief to set forth succinctly, separate from other considerations, the

ruling of Secretary Vilas in the somewhat celebrated *Guilford Miller* case, 7 L. D. 100, followed by Secretary Smith in *Northern Pacific Railroad Company v. Davis*, 19 L. D. 87, and our own views upon the points decided in those cases.

Sections 3 and 6 of the Northern Pacific act of July 2, 1864, read as follows:

> "Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections * * *.

Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act, but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

Secretaries Vilas and Smith, in the cases above referred to, (a) express doubts as to there being generally any implied power of executive withdrawal, and (b) hold two propositions of law applicable specially to the Northern Pacific grant: *first*, that in section 6 is an express reservation or withdrawal of place lands, which is by implication a negative upon any implied authority in the Secretary to withdraw indemnity lands, even if such power would otherwise be held to exist; *second*, that section 6 contains an express extension of the pre-emption and homestead laws "to all other lands on the line of said road when surveyed," which is

said to include *both even and odd sections within the indemnity belt.*

## I.

### THE IMPLIED POWER OF WITHDRAWAL.

Section 3 of the act makes a grant of quantity and it is clear that congress, in providing an indemnity belt, intended it should be more than a promise to the ear, and that it should be available to fill the losses in place lands. It is also clear that the lands in the indemnity belt could not be available for this purpose under the rule declared by the Secretary in the Miller case.

By act of June 2, 1862 (12 Stat. 413) congress had extended the right of pre-emption to unsurveyed as well as surveyed lands, and but for the exercise of the power of executive withdrawal, the entire indemnity belt of the grant would have been subject to appropriation for a long period, during which the company could have made no selection.

The right of selection was in terms limited to odd-numbered sections, and until the indemnity lands were surveyed the odd sections must remain unascertained.

It appears that even under the protection of withdrawals the lands in the indemnity limits fell far short of being sufficient to satisfy the losses.

That congress intended the right of indemnity conferred by the act of 1864 to be a substantial right is shown by the passage of the joint resolution of May 31, 1870 (16 Stat. 378). By this resolution the

company was given the right in any state or territory to select odd-numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the place limits between the date of the grant and the date of definite location, wherever the area of the first indemnity belt was insufficient. It is not reasonable to suppose that congress conferred a right of selection by the act of 1864, which was a barren right without the usual protection of an executive withdrawal, when within six years it gave such plain evidence of its intention that the company should receive the full quantity of land which the act purported to grant.

The implied power of withdrawal in aid of works of public improvement is a necessary power well settled to exist. *Wolcott v. Des Moines Company*, 5 Wall. 681; *Grisar v McDowell*, 6 Wall. 363; *Williams v. Baker*, 17 Wall. 144; *Wolsey v. Chapman*, 101 U. S. 755; *Dubuque, etc., Railroad Company v. Des Moines, etc., Railroad Company*, 109 U. S. 329; *Cedar Rapids, etc., Railroad Company v. Herring*, 110 U. S. 27; *St. Paul, etc., Railroad Company v. Winona, etc, Railroad Company*, 112 U. S. 720; *Buttz v. Northern Pacific Railroad Company*, 119 U. S. 55; *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1; *Bullard v. Des Moines and Fort Dodge Railroad*, 122 U. S. 167; *Hamblin v. Western Land Company*, 147 U. S. 531; *Riley v. Welles*, 154 U. S. 578; *Wood v. Beach*, 156 U. S. 548; *Wisconsin Central Railroad Company v. Forsythe*, 159 U. S. 46; *Spencer*

*v. McDougal*, 159 U. S. 62; *Northern Pacific Railroad Company v. Musser-Sauntry Company*, 168 U. S. 604.

It is the same as the power of withdrawal by the president, exercised without challenge in numerous cases for a hundred years, in establishing reservations for military purposes and for the Indians and for other purposes. See with reference to Indian reservations report of Public Land Commission, 1883, pages 240 to 243; with reference to military reservations report of Public Land Commission, pages 249 to 264. See also with reference to reservations for reservoirs at the head waters of the Mississippi in Minnesota and of the St. Croix in Wisconsin, report of Public Land Commission, pages 676 to 678. In the report of the Commissioner of the General Land office for the year 1888, pages 232 to 241, appears a statement of more than three hundred and fifty withdrawals on account of railroad grants covering a period of nearly forty years.

In *Wilcox v Jackson*, 13 *Peters*, 498, the court considered the effect of a reservation in 1804 by the War Department of a tract of land for military purposes and for an Indian agency, and held that this was a reservation by the President and took the land out of the operation of the pre-emption law. And in *Wolsey v. Chapman*, 101 U. S. 755, 769, this court held that an order by the Commissioner of the General Land Office constituted a reservation "by proclamation of the President."

In the case of *Grisar v. McDowell*, 6 Wall. 363,

this court passed upon the effect of an order made by the President of the United States through the War Department in 1850, reserving a tract of land for military purposes. Considering the authority of the President to make this order, the court said (p. 381):

> "But further than this: from an early period in the history of the government it has been the practice of the president to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.
>
> The authority of the president in this respect is recognized in numerous acts of congress. Thus, in the pre-emption act of May 29th, 1830, it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by act of congress, *or by order of the president*, or which may have been appropriated for any purpose whatever' (4 Stat. at Large, 421.) Again in the pre-emption act of September 4th, 1841, 'lands included in any reservation by any treaty, law, *or proclamation of the president* of the United States or reserved for salines or for other purposes,' are exempted from entry under the act (5 Id. 456). So by the act of March 3d, 1853, providing for the survey of the public lands in California, and extending the pre-emption system to them, it is declared that all public lands in that state shall be subject to pre-emption, and offered at public sale, with certain specific exceptions, and among others 'of lands appropriated under the authority of this act, *or reserved by competent authority*' (10 Id. 246). The provisions in the acts of 1830 and 1841 show very clearly that by 'competent authority' is meant the authority of the president, and officers acting under his direc-

tion. (*Wolcott v. Des Moines Company*, 5 Wall. 688)."

In the case of *Wolcott v. Des Moines Company*, 5 Wall. 681, the following facts appeared: By act of congress of August 8, 1846, there was granted to the then territory of Iowa:

> "For the purpose of aiding said territory to *improve the navigation of the Des Moines river from its mouth to the Raccoon Fork*, so-called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of the river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into the Mississippi river at the southeast corner of the state, and receives the waters of the Raccoon Fork about the middle of the state. The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Co v. Litchfield*, 23 How. 66. By the terms of the grant, the lands inuring to the territory were to be selected subject to approval of the secretary of the treasury, and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river

above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork. The validity of the executive order of withdrawal of the odd-numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd numbers) for six sections in width on each side of said roads, with the following proviso:

> "That any and all lands heretofore reserved to the United States by any act of congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any purpose whatsoever*, be and the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of the said railroads through such reserved lands."

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

> "It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior,

after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty of the land office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by congress for any of these public purposes to a state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey v. Chapman*, 101 U. S. 755, and *Riley v. Welles*, 154 U. S. 578, where the same withdrawal is considered.

## II.

### THE FIRST POINT DECIDED BY THE SECRETARY.

We have endeavored to show that the right of indemnity conferred by the grant was unavailable without the usual withdrawals by the executive, and that this implied power exists from necessity and has been exercised without question for a century.

This power of withdrawal, based, as this court has said, on necessity, we should expect to find in case of the Northern Pacific grant. And, as it is a power usual and necessary, it must be held to exist here, as in other grants, unless Congress has quite clearly and explicitly stated to the contrary. This well recognized power cannot be denied in the administration of the Northern Pacific grant, in the absence of a plain and unmistakable negative of the power by congress. The secretary of the interior finds in the provisions of section 6, creating a withdrawal *of place lands on general route,* evidence that this withdrawal was intended to be exclusive of any withdrawal of *indemnity lands after definite location.*

The language of the sixth section, operating to effect a preliminary withdrawal, when the general route is fixed, of all odd-numbered sections of land within forty miles of the line of general route, is

passed on in *Buttz v Northern Pacific Railroad Company* 119 U. S. 55, as follows:

> "The sixth section declares that after the general route shall be fixed, the president shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given to the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

> "The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the Secretary concludes, that it was the intention of congress that no withdrawal of *indemnity* lands should be made after the *definite* location of the road. He says:

> "Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive."

The Secretary loses sight, not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act, as apparent from its liberal terms and a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This, in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route, provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line of the road being only approximately determined by the map of general route, lands in the indemnity belt, not then ascertained as such, would have a very remote speculative value, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked

for until the date of the definite location, when, for the first time their proximity to the railroad would be assured.

Moreover, the indemnity belt was not fixed by the *general* route map. It could be determined only after *definite location*. The two classes of lands are radically different. To place lands the title passed upon definite location; but to indemnity lands the title passed only upon selection lawfully approved. The two withdrawals are entirely distinct and do not depend on the same reason or principle. Therefore there is no legitimate inference that congress, by providing withdrawals of *place* lands on filing map of *general* route, intended to prohibit the secretary from exercising his accustomed power to withdraw *indemnity* lands after the *definite* location was made.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress, that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior.

Referring again to the case of *Wolcott v. Des Moines River Company*, 5 Wall. 681, it will be observed that the court says that the granting act there under consideration *"carried along with it, by necessary implication, not only the power, but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated."*

A careful examination of the act there in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, *"subject to the approval of the secretary of the treasury of the United States."*

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: *"other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior;"* and the conclusion follows that the Northern Pacific grant carried with it not only the power, but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the Secretary of the Interior where he says:

> "Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive,"

meets with a conclusive answer in the case of *Wood v. Beach*, 156 U. S. 548.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders before the settlement of Wood. After citing, with approval, the Des Moines river cases, the court says of the withdrawals for the benefit of the railroad companies:

> "These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows.
>
> 'Sec. 4. And be it further enacted, that, as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interest'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd-numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by this court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "*the odd sections of land*

*hereby granted shall not be liable to sale, entry or pre-emption.*" This is the congressional withdrawal which the Secretary of the Interior insists must be held to be exclusive of any withdrawal by a subordinate authority. But in *Wood v. Beach*, a direction to the Secretary to withdraw from market "*the lands granted by this act*," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "*lands granted*," then the land in controversy was withdrawn by virtue of the provisions of section 6 above noted, but if indemnity lands are not "*lands granted*," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

In construing this grant in *Northern Pacific R. R. Co. v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction. He says:

> "While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

## III.

### THE SECOND POINT DECIDED BY THE SECRETARY.

The second ground on which the Secretary places his decision in the Miller case is, that Sec. 6 contains an *express* prohibition on executive withdrawals of land for indemnity. This conclusion is based on the theory that the section extends to the indemnity lands the pre-emption and homestead laws. The language relied on is this:

> "But the provisions of the act of September eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

Section 6, after providing for the survey of lands within forty miles of the line of general route, which was the limit of the place lands, says, (a) that the lands "hereby granted" shall not be subject to sale or entry or pre-emption; (b) that the pre-emption and homestead laws are extended to "all other lands on the line of said road when sur-

veyed;" and (c) that the reserved alternate sections when offered for sale shall not be sold for less than $2.50 per acre.

Does the extension of the pre-emption and homestead laws include, as held by the Secretary, the indemnity lands? We contend not and say that the extension of those laws was only to the *even alternate sections within the place grant.*

It is plain that the statutory withdrawal of "lands granted" contained in the immediately preceding sentence of the section applies only to place lands. *Buttz v. Northern Pacific R. R. Co.*, 119 U. S. 55. Then follows the provision in question extending the pre-emption laws to "all other lands on the line of said road when surveyed." What lands are meant by the words quoted? "All other lands *on the line of said road*" do not certainly mean lands very remote from the road, and where is the line to be drawn? The natural inference is "other lands" in contradistinction to the lands just spoken of as reserved for the company; that is the alternate even sections within the place grant. This conclusion is strengthened by the qualification "when surveyed." The preceding langaage in the same section required a survey of the place lands. No survey was mentioned, or so far as the act shows contemplated, of the indemnity limits. So it was the same lands to be surveyed, as before in the same section provided, which were to be open to entry and settlement. This conclusion is reinforced by the sentence following, which says that the reserved alternate sections shall not be sold at less

than $2.50 per acre. There can be no question that these reserved sections are the even sections in the place limits, and the expression is synonymous with "all other lands on the line of said road." It would be as reasonable to include lands in the indemnity limits in one class as within the other. That the even sections in the indemnity limits are not increased in price to $2.50 per acre is clear from the reason for which the increase in price was made, namely, to enable the government to make good from the sale of the reserved sections the value of the lands granted. And this is the construction of the Interior Department. 19 *Land Decisions*, 381.

An examination of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of lands to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and

> "No sections of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned,

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, that the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldiers' bounty land warrants, estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided*, that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further*, that the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further*, that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid,

> shall be entitled to all the rights of pre-emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights,' after the lands shall have been released from reservation in the same manner as if no reservation existed."

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands, from the passage of the act up to the time of "*final allotment of the alternate sections to such railroads by the general land office.*" The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

> "First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—
>
> "Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off

the inhibition contemplated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land* 'prior to the *final allotment* of the alternate sections to such railroads by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. From the date of the 'definite location' of the road (viz., according to Attorney General's opinion, February 16, 1857), *when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853, with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emptions will not attach under this law to the *United States alternate reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions of the pre-emption law as to alternate sections of railroad grants increased the price per acre at which these lands might be acquired during the period contemplated by the act of 1853, to $2.50 per acre. The right

of settlers to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864.

Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. From the very beginning, whenever land was granted to states to aid in the construction of railroads, although the states usually took title by present grant, yet the condition was uniformly imposed that the lands should not be sold or conveyed until the road or the part thereof opposite to the lands had been constructed. The fact of the construction and its approval was evidenced by the allotment of the lands and their certification by the general land office.

The grant of July 2, 1864, to the Northern Pa-

cific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its rights to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853 extended the operation of the pre-emption law over the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864, the company took a present title, without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the preemption and homestead laws to the reserved alternate sec-

tions in the place limits, no rights to these lands could be acquired by settlers, and it is important to observe that the same policy has been followed in every grant since the passage of the Northern Pacific act:

> Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant to Stockton and Copperopolis Railroad Company, act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573).

In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections.

After concluding that section 6 forbade a withdrawal of indemnity lands, the Secretary assigns as a reason for the insertion of such a provision in the Northern Pacific grant, the fact that it was a grant of unprecedented magnitude and that congress did not intend that the large body of lands in the indemnity limits should be withheld from settlement. But the language so construed by the secretary is as before stated merely the equivalent of the provisions inserted in every other grant made direct to a railroad company without regard to the quantity of lands granted.

That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3,

1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision*, and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections.

And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.*, 77 Fed. Rep. 69; 48 U. S. App. 6, and is as follows:

> "Department of Interior.
> Washington, D. C., March 9th, 1865.
>
> "Sir:—
>
> "Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the

granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't servant,

"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections.

The conclusion of the Secretary, that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal, is reached without a consideration of the acts of 1841 and 1853 here discussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

This restriction, that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed, is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862, (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States, to which the Indian title had been, or should be, extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the Secretary of the Interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company when surveyed, although two years earlier the same laws had been extended to these same lands while still unsurveyed.

## IV.

### THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made under this grant, and the authority to make such withdrawals remained unquestioned until the decision by the secretary

in the Guilford Miller case in 1888. The reports of land decisions by the Secretary previous of 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of *Prest v. Northern Pacific Railroad Company*, 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States v. Pugh*, 99 U. S. 269, this court said:

> "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

In *United States v. Moore*, 95 U. S. 763, this court gave one of the reasons for this rule:

> "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case overruling the long settled construction must rest solely upon his argument, which we have un-

dertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect.

The conclusion of the supreme court of North Dakota sustaining the power of withdrawal is supported by *Thompson v. St. P. & M. & M. Ry. Co.*, 83 Fed. Rep .546, and *Southern Pacific Railroad Co. v. Grocck*, 87 Fed. Rep. 970.

In the latter case, decided by the circuit court of appeals for the Ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866 (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held, not only that section 6 did not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

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